

An appeal

- by -

General Store-All Co. Ltd.
("General Store-All")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2001/891

DATE OF HEARING: April 4, 2002

DATE OF DECISION: April 12, 2002

DECISION

OVERVIEW

General Store-All Co. Ltd. (I will use “General Store-All” and “the employer” for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* (“the *Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 4, 2001. The Determination orders Store-All to pay Donald McLean \$1,236.70 in wages, vacation pay and interest included.

The Determination is that the employee is not a manager and that he is therefore entitled to be paid overtime wages. The employer, on appeal, argues that the employee is in fact a manager. I have found that there is not evidence to show that the McLean’s primary duties are that of a manager as the term “manager” is defined in the *Employment Standards Regulation* and that the Determination should accordingly be confirmed.

A hearing has been held in this case.

APPEARANCES

Allen Sutherland	On behalf of General Store-All
Donald A. McLean	On his own behalf

ISSUES

The issue is the matter of whether the employee is or is not entitled to overtime wages. Underlying that issue is the main issue which I must decide, the matter of whether the employee is or is not a manager as the term “manager” is defined in the *Employment Standards Regulation* (the “*Regulation*”).

The employer suggests that it should not be made to pay overtime wages because it was to the employee’s benefit that he worked overtime as he did.

The employer argues in its written submission that section 31 of the *Act* allows a person to waive the right to overtime pay.

The employer on filing the appeal claimed that the Director is unable to go back 2 years in calculating the amount of wages owed. This is not now an issue as the employer now realises that the *Act* does allow the Director to collect wages that are due and payable in the last two years of a person’s employment.

What I must ultimately decide is whether it is or is not shown that the Determination ought to be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

General Store-All is in the business of renting out storage space to companies and individuals. The business is operated by Allen Sutherland. Sutherland has an office on the second floor of General Store-All's facility. He, from that office, oversees General Store-All's operations as well as a number of other businesses.

General Store-All's storage facility consists of some 35,000 square feet but Sutherland has found that the day-to-day running of the operation can be handled by a single person, what Sutherland calls "a manager". There is only one manager on duty at a time. Don McLean was one of the employer's managers. He was employed from December 11, 1989 to June 5, 2000.

The employee claims that the job that he applied for was not that of a manager and that so far as he knows he was never promoted to the position of manager. That may be, but it is clear to me that McLean, in Sutherland's view, managed General Store-All.

Outside of the managers, there is only Sutherland and a maintenance worker. The maintenance worker took instructions from Sutherland. He did not report to McLean.

Maintenance and repairs were either performed by the maintenance worker or the work was contracted out. McLean was expected to supervise the work of contractors but it was not his job to supervise and direct employees to any great extent. There was no one to supervise.

Sutherland tells me that McLean was a manager in the sense that his job is much like that of an apartment manager, the only difference being that General Store-All rents out storage space, not living space. I find that it was McLean's job to look after the day to day running of the facility. He answered the phone, rented out space, collected rents, calculated refunds, assisted customers in other ways, and he had to see to it that the facility was kept in good repair.

Sutherland claims that McLean had important decision making authority. He also claims that decisions were made by consensus in meetings between him and his managers. I find that the employer does not show that. As matters are presented to me, I am led to believe that all of the important decisions were made by Sutherland, alone, or after consulting with his managers. McLean could only make recommendations which would then be accepted or rejected by Sutherland.

McLean did not exercise any power to hire and fire. McLean did not ever interview anyone.

McLean did not handle the money. He calculated refunds according to a set scale and a cheque was then issued by Sutherland.

McLean did not have the power to set the rate charged for space. Sutherland decided what would be charged customers.

When a tenant was behind in the rent, the decision to send matters to a bailiff rested with Sutherland.

McLean worked more than 8 hours on Mondays and that suited McLean. He did not mind working a long day. He just wanted to work as few days as possible.

ARGUMENT & ANALYSIS

The employer argues that McLean was treated honestly and fairly. I have no reason to doubt that but that is not something which has a bearing on the appeal or the Determination. The question is, What, if anything, is McLean entitled to under the law?

The employer argues that working overtime suited McLean. That also has no bearing on the appeal or the Determination. An employee cannot agree to accept less than what he or she is entitled to under the *Act*. An agreement to accept less than that is null and void.

- 4 The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 apply to union employees. They have no application here.

The employer has argued that section 31 of the *Act* somehow allows a person to waive the right to overtime pay. How that might be has not been explained to me. My reading of section 31 is that it does nothing but require that employers post notice of the hours of work and notice of any change in the hours to be worked.

- 31 (1) An employer must display hours-of-work notices in each workplace in locations where the notices can be read by all employees.
- (2) An hours-of-work notice must include
 - (a) when work starts and ends,
 - (b) when each shift starts and ends, and
 - (c) the meal breaks scheduled during the work period.
- (3) An employer must give an employee 24 hours' notice of a change in shift unless
 - (a) as a result of the change the employee will be entitled to overtime wages, or
 - (b) the shift is extended before it ends.

As noted above, I accept that McLean is, at least in Sutherland's view, a manager. The question is, however, Is McLean a "manager" as that term is defined in the *Employment Standards Regulation*. If he is, he is not entitled to overtime pay. If he is not, he is entitled to overtime like most other employees. [Part 4 of the *Act* calls for the payment of overtime pay. But section 34 (1) (f) of the Regulation provides that Part 4 of the Act does not apply to a manager.]

The term "manager" is defined in section 1 (1) the *Regulation*. The definition is as follows:

"manager" means

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

In *Director of Employment Standards*, (1997) BCEST No. D479/97 (Reconsideration of BCEST No. D170/97), a panel of the Tribunal had this to say in regard to determining whether a person is or is not a manager for the purposes of the *Act*.

"The task of determining if a person is a manager must address the definition of manager in the Regulation. If there are no duties consisting of supervising and directing other employees, and there is no issue that the person is employed in an executive capacity, then the person is not a manager, regardless of the importance of their employment duties to the operation of the business. That point was made by the Tribunal in *Anducci's Pasta Bar Ltd.*:

"Many of the duties to which the employer pointed as evidence of Lum's managerial status did not address the definition of manager in the Regulation. Handling of cash, custody of a key, responsibility for checking purchases and the like are all responsible duties, but they are not connected with the supervision or direction of employees."

Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterisation of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party."

The panel went on to decide that there are objective factors which are important to deciding whether a person is or is not a manager for the purposes of the *Act*. The factors are as follows:

- (1) the power of independent action, autonomy and discretion;
- (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; and
- (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees, and
- (4) that the person's job description include some reference to managing or the supervision and direction of employees.

All of the above factors need not be present but it must be shown that the person actually wields what is true managerial authority. Deciding whether a person is or is not a manager is, moreover, a question of degree: What amount of managerial power and authority is exercised? That to some extent will depend on the person's daily activities and the significance of their decision making.

As matters are presented to me, it is clear to me that McLean cannot by any stretch of the imagination be considered to be a manager as the term is used in the Regulation. It was not an important part of McLean's job that he supervise and direct employees. McLean had important responsibilities but he did not exercise the power and authority that is typical of a manager employed in an executive capacity. He had only a power to make recommendations. He did not make final decisions on matters which were of vital importance to General Store-All. He did not have the discretionary power of a manager. Sutherland made all of the important decisions from what I can see.

It is my conclusion that the delegate is correct in deciding that Don McLean did not work as a manager as the term "manager" is used in the Employment Standards Regulation. The Determination is therefore confirmed.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated December 4, 2001 be confirmed in the amount of \$1,236.70 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal